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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1411.

REV. JOHN J. CAULFIELD, Pastor, St. Athanasius Church, REV. THOMAS A. KANE, J.C.D., Pastor, Nativity of Our Lord Church, VERY REV. JAMES G. SHERMAN, O.S.A., Pastor, St. Denis Church, REV. MSGR. FREDERICK J. STEVENSON, Pastor, St. John Chrysostom Church, and REV. GEORGE R. VERMEIREN, Pastor, St. Charles Borromeo Church,

Petitioners,

v.

PETER W. HIRSCH, Regional Director for the Fourth Region, National Labor Relations Board,

and

ASSOCIATION OF CATHOLIC TEACHERS, LOCAL 1776, AFT, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

1. The Government concedes that this case presents the same question that is pending before the Court in

National Labor Relations Board v. Catholic Bishop of Chicago, No. 77-752, i.e., whether the National Labor Relations Act may constitutionally be applied to parochial schools, but opposes the instant Petition on the ground that this case also involves a question of district court jurisdiction. The Government would make it appear as though a question of jurisdiction separate and apart from the constitutional issue is presented by this case. Quite the contrary, Petitioners' resort to the district court for judicial relief against the Board's application of the Act and its procedures to their schools is but part and parcel of their constitutional position that the Board may not regulate employment relations in parochial schools. Properly perceived, the question of district court jurisdiction is but the natural corollary, another facet, of the same basic issue of the constitutionality of the Board's involvement in the affairs of Petitioners' schools. If, as Petitioners contend, the Constitution prohibits Board jurisdiction over parochial schools, the federal courts are doubtless obliged to enforce that prohibition; conversely, if, as the Board contends, it may constitutionally regulate the employment of teachers by parochial schools, the federal courts are without authority to disturb that scheme. In short, the question of district court jurisdiction is inextricably intertwined with the fundamental constitutional issue; it is not a reason to deny certiorari in this case, but rather an additional reason why certiorari should be granted in this case.

2. Petitioners brought this suit not to review Board action, but to enjoin Board action at the very moment of its inception. Institution of this action constituted the only effective means to Petitioners to prevent their enbroilment in Board administrative processes and all their

entangling ramifications which they sought to challenge on constitutional grounds.[1] When the question is ". . . whether it is constitutional to fasten the administrative procedure on to the litigant, the administrative agency may be defied and judicial relief sought as the only way of protecting the asserted constitutional right". *Public Utilities Commission of California v. United States,* 355 U. S. 534, 540 (1958).

Neither *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938), nor *Leedom v. Kyne,* 358 U. S. 184 (1958), relied upon by the Government, teach otherwise. In *Myers,* an early Commerce Clause challenge to the constitutionality of the entire Act, the Court confirmed its observation, made the prior term in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937), that the Act ". . . does not purport to extend to the relationship between *all* . . . employees and employers . . . [but] must be construed as contemplating the exercise of control within *constitutional bounds* . . .", 301 U. S. at 31 (emphasis added). In *Leedom,* as here, suit was properly brought not to "review" Board action "made within its jurisdiction" but rather to enjoin and strike down Board action taken "in excess of its delegated powers".

The applicable principle was summarized by the Court some years ago in *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U. S. 752 (1947): ". . . [T]he presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flow-

1. The Board's statement (Brief in Opposition, pp. 5-6) that "The procedures leading to judicial review in the ordinary course do not themselves violate petitioners' rights and thus there is no reason to permit injunctive action in the district court" epitomizes the Board's misunderstanding of Petitioners' position. It is just such procedures that Petitioners have contended from the first violate their constitutional rights and justify judicial intervention.

ing from delay incident to following the prescribed procedure, . . . [is] sufficient to dispense with exhausting the administrative process before instituting judicial intervention." 331 U. S. at 773.[2]

3. Decision of the First Amendment claims raised by *Catholic Bishop of Chicago, supra,* and this case, will be aided, not hampered, by the grant of this Petition. The issues are starkly posed here, viz.—273 parochial elementary schools employing some 2,000 lay teachers; there is an extensive trial record compiled under the supervision of a federal judge rather than a non-lawyer Board agent as is often the case in Board proceedings; [3] there is a carefully reasoned and comprehensive court opinion which addresses and determines the constitutional issues; and the conflict between the Court's view that Petitioners' schools constitute ". . . an integral part of the religious mission of the Catholic Church . . ." [4] and the Board's view that the very same schools are merely ". . . religiously associated . . ." [5] cannot be as sharply focused in any other case.

2. Exhaustion of administrative procedures is also regularly dispensed with when the constitutionality of a congressional enactment is placed in issue, where pursuit of the agency process cannot result in disposition of the constitutional claim or when a requirement to proceed with the administrative remedy would be wholly futile. See *Oestereich v. Selective Service Board,* 393 U. S. 233, 242 (1968); *Glover v. St. Louis-San Francisco Railway Co.,* 393 U. S. 324, 330 (1969); *Weinberger v. Salfi,* 422 U. S. 749, 765-66 (1975).

3. Government carping over the court record (Brief in Opposition, p. 8) comes with ill grace. The Government fully participated in the creation of the record; the testimony of Petitioners, the Archdiocesan Superintendent of Schools, and the intervenor union president, was devoted to an examination of the impact which application of the Act would have upon Petitioners' schools and, to be sure, formed the basis of the district court's opinion and decision that the Act may not be constitutionally applied to these religious schools.

4. *Lemon v. Kurtzman,* 403 U. S. 602, 616 (1971).

5. *Archdiocese of Philadelphia,* 227 NLRB No. 177 (1977).

4. Board suggestions that perhaps the issues posed by this case can be resolved on a statutory basis obviating "the necessity of ever deciding the constitutional questions" (Brief in Opposition, pp. 7-8) overlook the plain fact that the Court has already accepted the constitutional issues for review and decision in *Catholic Bishop of Chicago.* It is submitted that fullest consideration of these issues can only be had by the grant of certiorari in this case. Requiring Petitioners to complete the administrative route (including appellate review of the Board's decision [6]) will not avoid determination of the constitutional issues: should the impounded ballots be counted and the intervenor union prevail, the Board will certainly order Petitioners to bargain and they, with equal assurance, will refuse, asserting their constitutional rights; should the union not prevail, Petitioners' demand for declaratory relief from the continuing and, perhaps, recurring Board incursions into the affairs of these parochial schools will nevertheless require decision. See, *Super Tire Engineering Co. v. McCorkle,* 416 U. S. 115 (1974); *cf., Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967). No further proceedings can or will eliminate the necessity for constitutional adjudication.

5. The Government does not deny the national importance of the constitutional issues presented by this case. The Government, of course, sought and obtained a writ of certiorari in *Catholic Bishop of Chicago* for review of these same issues. However, because Petitioners defied the administrative agency and sought immediate judicial

6. The Board has already rejected all of Petitioners' non-constitutional arguments. *Archdiocese of Philadelphia,* 227 NLRB No. 177 (1977). Petitioners did not present their constitutional contentions to the Board but only to the court whose decision is here sought to be reviewed in the interests of prompt and final resolution of the issues.

relief against the gradual erosion and ultimate destruction of their constitutional rights at the hands of the Board, the Government contends that review of the core issues in this case should be denied on the ground that district court intervention has placed them beyond the Court's reach. Petitioners submit that district court intervention in these circumstances is but another aspect—the logical extension—of the basic constitutional position which they and the Catholic Bishop of Chicago advance; that the Court's decision of the constitutional claims will necessarily, if indirectly, determine the matter of the propriety of district court involvement; and that the district court's presence in this case is not a reason for denying review but rather a substantial, additional reason to grant certiorari and resolve the church-state conflict. Petitioners urgently request that certiorari be granted in this case and that the issues it presents be consolidated for review with those presented by *Catholic Bishop of Chicago*.

Respectfully submitted,

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